

**IN THE COURT OF APPEAL
OF THE TURKS AND CAICOS ISLAND**

**CLAP 3 / 2023
appeal from CL105/2019)**

BETWEEN

PATRICIA GRAND'LAIR

APPELLANT

And

ETIENNE DEBLOIS

RESPONDENT

**Coram: The Honourable Mr Justice Adderley, JA President(Ag.)
 The Honourable Mr Justice John, JA
 The Honourable Mr Justice Turner, JA**

**Appearances: By Microsoft Teams
 Mr. John Rutley for the Appellant
 Mr. Etienne Deblois pro se**

Hearing date: 9 November, 2023

Delivery Date: 17th April 2024



Costs- Orders for Costs- Overturning Costs Orders - Material Change in Circumstances - Fraud – Whether the Appellant proved that the Costs Orders

were tainted by fraud - Whether the learned judge erred in refusing to overturn Costs Orders by applying the functus officio rule.

Agyemang CJ made 2 costs Orders, one on 2 February 2021 after striking out an action and another on 9 March 2021 for costs of the day after granting a stay of the 2 February 2021 costs Order pending the final determination of the related insolvency proceedings that had been ordered in the action. The defendant did not appeal the costs Orders. After a passage of about 2 years the defendant applied to a judge of the Supreme Court to set aside the said costs Orders on the grounds that there had been a material change in circumstances since the orders were made, namely the dishonesty and fraud of the recipient of the costs orders by which he maintained that the orders were tainted and should either not be enforced or should be set aside. The learned judge dismissed the application on the ground that he could not revisit the orders because the court was functus officio. The learned judge also found that the orders were not procured by fraud. The appellant appealed.

Held: *Dismissing the appeal, the learned judge was right to dismiss the application on the grounds which he did. Furthermore, the appellant failed to satisfy the burden of proof required to overturn an order on the ground of fraud or dishonesty.*

Cases referred to:

Grand Lair and Anor v Deblois (CL 105 of 2019)[2020] TCASC 27 (17 July 2020), Lazarus Estates Ltd v Beasley [1956] 1 QB 702, Patricia Grand 'Lair v Etienne Dubois CL-AP AP 03 / 2023 [2023] TCACA11(24 May 2023), Takhar v Gracefield Developments Ltd and others [2019] UKSC 13, Tinker v Esken Ltd (formerly Stobart Group Ltd) [2023] EWCA Civ 655, 2023 WL 03901749

JUDGMENT

ADDERLEY, P (Ag.)

1. The gravamen of this appeal is the setting aside of costs orders made by a judge in favour of the respondent.
2. The essential background facts of the case was succinctly set out by this court in the judgement of Cornelius Thorne JA (CL-AP AP 03 / 2023 [2023] TCACA11(24 May 2023)) by which we granted leave to appeal. I will therefore quote from her judgment:

“[1] Grand’Lair (the “Applicant”) and Deblois (the “Respondent”) are a divorced couple. They are also directors and 50% shareholders in the DGCL Consultation (“DGCL”), a Turks and Caicos Islands company, now in liquidation. Unhappy differences arose between them, and in the substantive matter, the Applicant brought a derivative action with respect to DGCL alleging unscrupulous dealing by the Respondent in the sale of a condo owned by DGCL. The sale proceedings (US \$354,013.86) and other monies are subject to a freezing order, and held with CIBC First Caribbean International Bank (Bahamas) Limited. The Applicant sought 50% of the value of the company’s assets as her entitlement.

[2] On 2nd February Agyemang CJ ordered the company to be wound up and a liquidator to be appointed. She struck out the Applicant’s claim and awarded costs to the Respondent (“the first costs order”). No written decision was given. These proceedings were later stayed pending final determination of the related insolvency proceedings. The Applicant was ordered to pay costs in that application as well (“the second costs order”).¹

[3] Thus the Applicant is liable for the Respondent’s costs conservatively estimated at US \$320,000.00, a sum which would wipe out the Applicant’s claim for 50% of the value of the shares of the company. The Liquidator

¹ The “second costs order” was dated 9 March 2021.

filed a summons for directions which was heard by Gruchot J, and the Applicant sought to have the costs orders overturned, unsuccessfully. He sought leave to appeal, also unsuccessfully. The decision of Gruchot J was made on the 27th February 2023, with reasons dated 8th March 2023.²

[4] This is an ex parte application for leave to appeal Gruchot J's decision, and that if such leave be granted, execution of the costs orders be stayed pending the determination of the Applicant's appeal."

3. Leave to appeal was granted and execution of the costs orders was stayed.
4. The appellant now moves the court for an order that the Order of Mr Justice Gruchot made 27 February 2023 be set aside. By that order the learned judge ordered among other things that the claims of the Respondent and Mr Can Gebes having been disallowed by the Liquidator and "*subject to the costs Orders of 2 February 2021 and 9 March 2021*", a distribution of the net assets of the liquidation by the Liquidator be made equally between the shareholders (namely the Appellant and Respondent herein) of DG Consultation Ltd ("DGCL"). She clearly objects to the clause "*...subject to the costs Orders of 2 February 2021 and 9 March 2021*" because those are the costs orders she now seeks to have overturned.
5. As stated in his written submissions and in oral arguments before the court on 9 November 2023:

"John Rutley

I refer the court firstly to the decision of your own court and where justice honourable Madam Justice Cornelieus [sic] Thorne stated in the written judgment at paragraph 29 and if I may take the moment, the real crux of this appeal is ground one that the learned judge erred in failing to overturn the cost order."

² Patricia Grand 'Lair v Etienne Dubois CL-AP 03/2023.

6. His grounds of appeal are accordingly an iteration of aspects of that one theme, namely:

“1. The Learned judge erred in law in failing to overturn the order dated 2 February 2021 on the grounds that there had been a material change in circumstances since it was made (namely the liquidator and then, on 17th February 2023, the Learned Judge himself, deciding that the appellant was in fact entitled to 50% of the company’s assets, which had been the basis of her original claim).

2. The Learned Judge erred in:

a. Failing to find that pursuant to the common law jurisdiction to set aside judgments procured by fraud, as described in Takhar v Gracefield Developments Ltd (2020) A.C. 45 (from paragraph 43 onwards) he had the power to set aside the costs order dated 2 February 2021

b. Failing to conclude that this jurisdiction should be exercised in the present case to set aside the costs order dated 2 February 2021

3. If the Learned Judge considered that an application was required for the Court to assess the impact of the dishonesty on the Order dated 2 February 2021, he erred in finding that “nothing would be gained” if the Appellant were permitted to make such an application, and therefore in not adjourning the hearing so as to allow such an application to be issued.

4. The Learned Judge erred in assuming that the 2nd February 2021 order was made without regard [sic] the debts which the Respondent alleged the Company owed.

5. The Learned Judge erred in failing to have regard to the Respondent’s failure to provide honest and truthful

evidence, and the impact of that failure on the Court's costs jurisdiction under the Rules of the Supreme Court 2000, O. 62 r. 3 and r. 10.

6. The Learned Judge misinterpreted the facts of the fraud perpetrated by the Respondent that was uncovered by the Liquidator and provided to the Court.

7. The Learned Judge failed to give due consideration to the conclusions of the liquidator that sanctions against the Respondents dishonesty and fraud be determined.

7. At the hearing on the application by the respondent for security for costs on 17 July 2020,³ Agyemang CJ decided on the question of whether the appellant (then the first plaintiff) had assets in the jurisdiction to satisfy the requirements. She opined:

“47. Even so, it is my view that the fifty percent shareholding of the first plaintiff should entitle her to funds, out of which costs of suit may be enforced against the first plaintiff should the suit fail.

48. I am thus persuaded, for whether the company ends up being wound up (which given the state of the pleadings, it may very well come to), or whether the plaintiff's share may be acquired by the defendant given the rancorous administration of the second plaintiff by the divorcing couple, or whether the parties would keep the company running its business, the plaintiff would in every circumstance, be entitled to the monies accruing from the activity.”

8. These remarks formed the basis upon which Agyemang CJ determined that the appellant's 50% equity interest in DGCL was property in the jurisdiction upon which she could rely to refuse the application by the respondent for security for

³ Grand Lair and Anor v Deblois (CL 105 of 2019) [2020] TCASC 27 (17 July 2020).

costs. They also show that based on the state of the pleadings the winding up of DGCL was in her mind within the realm of possibility.

9. Mr Rutley expressed his understanding that the effect of the 9 March 2021 Order was to amend the 2 February 2021 cost Order and stay it on the basis that there would be a further and complete determination after Agyemang CJ had proceeded to appoint the liquidator and the examinations of witnesses concluded pursuant to the Insolvency Ordinance. The learned judge correctly pointed out at [39] of his judgment, that Mr Rutley misunderstood the Order. The costs Order made by the Agyemang CJ was not set aside, it was stayed. It was not appealed, and is still in effect.
10. He also argued that the judge was wrong not to have reviewed the costs order because the court was *functus officio*. We have reviewed the reasons given by Gruchot J for refusing to revisit the costs orders on the ground that the court was *functus officio*. We agree with his reasons.
11. At [43] of his judgment the learned judge concluded that the 2 February Order was not obtained by fraud. At the time of giving his reasons on 8 March 2023 he had the benefit of The Third Report of the Liquidator which was first presented to the Court on 22 September 2022.
12. The substantive application before the Hon Chief Justice on 2 February 2021 was to re-amend the amended statement of Claim which had been filed 18 months earlier (on the 16 August 2019) and after 9 days of the trial having taken place.
13. The Hon Chief Justice dismissed the application to re-amend, and ordered the appointment of a Liquidator under the Insolvency Ordinance 2017. Costs followed the dismissal. It is, settled law that costs are within the complete discretion of the court.

14. I have read the documents that were stated in the Order to be before the learned Chief Justice, and although she did not give the reason for her decision it is self-evident especially from the skeleton arguments of the defendant that she could have dismissed it for any one or more of a plethora of reasons. The way the defendant put it was that the Hon Chief Justice had “*had enough*” having repeatedly intimated to the plaintiff during her evidence in the first 9 days of the uncompleted trial that the claim was ill conceived. Apparently, a similar sentiment had been intimated by the previous Chief Justice Hon Ramsey-Hale and Acting Justice Hylton (adjudicating at an examinations hearing) but the plaintiff pressed on.
15. One of the claims in the draft re-amendment was for “*...an order pursuant to Section 232(f) of the Companies Ordinance that the Court appoint a liquidator of the Company under the Insolvency Ordinance 2017*”. This is the oppression claim and based on the pleadings this claim could have been made since 2019, with the consequential saving in time and costs over the intervening 2-year period.
16. As the time for appealing has long past the only other possible ground for the consideration of setting aside the costs order is a material change in circumstances. It is settled law that judgments can be set aside in case of a material change in circumstances or specifically as claimed in this case for the discovery of fraud.
17. Was there a material change in circumstances after the 2 February costs order in this case? We think not.
18. The cost order was made on 2 February 2021. The Third Liquidator’s Report in which the issue of fraud was raised was first placed before the Court on 29 September 2022. The report rejected the claims of the two largest creditors Deblois for salary claimed, and Mr Gebes for IT consulting services. It also contained the opinion of the Liquidator that for the purposes of Section 275 (2)(a) of the Insolvency Ordinance (manufacturing fictitious losses) the

Liquidator believed that the respondent attempted to account for part of the company's assets by presenting fictitious losses or expenses; that for the purposes of Section 276(1)(falsifying books and making fraudulent entries) the Liquidator believes that Mr Deblois had falsified documents belonging to DGCL with the intent of defrauding DGCL and that for the purposes of Section 278(1) the Liquidator believed that Mr Deblois has made false representations for the purpose of obtaining the consent of DGCL's creditors to an agreement with reference to the Liquidation. This conduct attracts criminal sanctions under the mentioned sections of the Ordinance. Mr Deblois denied each of these allegations in his 8th affidavit dated 31 January 2023.

19. None of the allegations were known to the learned Chief Justice when she made her orders on 2 February and 9 March 2021. Mr Rutley in seeking to rely on materially changed circumstances seemed to be arguing that had these and other revelations in the Third Liquidator's Report been known to the Honourable Chief Justice she may not have appointed a liquidator of DGCL, and made the costs Orders in favour of Mr Deblois.

20. He argued that the Liquidator's findings tainted the costs orders with the fraud of Mr Dublois, and Gruchot J ought not to have constrained himself to the principle of the *functus officio* rule in these circumstances. He submitted that the learned Judge should have set the costs Orders aside.

21. Gruchot J clearly considered the Report in his reasons dated 8 March 2023 because he referred to it in [47] of his judgment. He found that the costs Orders were not obtained by fraud. This is a finding that is not clearly wrong on the facts and with which an appellate court will not interfere.

22. Furthermore, all of the case law which was produced by the respondent especially **Takhar v Gracefield Developments Ltd and others**⁴, and Lazarus

⁴[2019] UKSC 13.

Estates Ltd v Beasley⁵ were discussed by the learned judge and found not to assist the appellant. We find no fault with the judge's interpretation of these cases.

23. In **Tinkler v Esken Ltd (formerly Stobart Group Ltd)**⁶ relied on by Mr Rutley, Sir Geoffrey Vos MR on behalf of the panel (Vos MR, Popplewell and Snowden JJA) interpreting Lord Sumption's *obiter dicta* at [60] to [61] of **Takhar** stated at [12]:

“In modern terms, we can perhaps regard the action to set aside a judgment for fraud as akin to an action for deceit. The only significant differences are that the court, rather than the opposing party to the first action, has to be shown to have been deceived, deliberate dishonesty is required, and materiality rather than simple reliance must be shown. If the elements are made out (misrepresentation or misleading conduct, made or undertaken fraudulently, with reliance for deceit and materiality for an action to set aside a judgment), the contract or the judgment can be set aside.”

24. Lord Sumption had pointed out in **Takhar** (see [60] to [61]) that an action to set aside an earlier judgment for fraud is not a procedural application but a cause of action, and the cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings and not to the underlying dispute. If it is successful, it vitiates the judgment. In this case it would vitiate the costs orders.

25. Many issues were presented to us, but there was no argument made nor was there any evidence on the Record that the Court had been deceived by the conduct of the respondent. To the contrary the Third Liquidator's Report clearly states that

⁵ [1956] 1 QB 702.

⁶[2023] EWCA Civ 655, 2023 WL 03901749.

in the opinion of the Liquidator the fraud and dishonesty in question were carried out “*with the intent of defrauding DGCL and the liquidation*”. This was after the costs Orders had been made. This is why the possibility of criminal referral under the Insolvency Ordinance arose. Furthermore, it is not enough to allege fraud, it must be proved.

26. It is therefore evident that on the facts and circumstances of this case the costs Orders do not fit within the parameters which the law requires for a judgment to be regarded as tainted by fraud, as maintained by the appellant.

27. In these circumstances and for the reasons given above we dismiss the appeal with costs of this appeal to the Respondent to be taxed if not agreed.

ADDERLEY JA, PRESIDENT (AG)

JOHN, JA



I AGREE

I ALSO AGREE

TURNER, JA